IN THE

Supreme Court of Virginia

RECORD NO. 160500

LAWRENCE E. GELBER AND DARLENE A. FLEISCHMANN, Co-Executors of the Estate of Beverly E. Gelber, Deceased and Co-Trustees of The Beverly E. Gelber Trust, Dated Dec. 1, 2010, as restated and amended,

Appellants,

v.

MERYL ANN GLOCK,

Appellee.

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Undue influence (i.e., the overcoming of person's free will) and fraud (i.e., detrimental reliance and acting upon a factual misrepresentation) presuppose the existence of capacity. When a person lacks capacity, there is no room for the operation of fraud or undue influence. *See Chappell v. Trent*, 90 Va. 849, 934 (1893) ("[A]ct[ing] upon the suggestions of a third person . . . pre-supposes a testator possessed of a sound and disposing mind and memory."); *see also Lisk v. Hankins*, 156 Fla. 126, 127 (1945) ("[T]he issue of undue influence, or the issue of fraud, presupposes the existence of testamentary capacity.").

As soon as Darlene A. Fleischmann ("Mrs. Fleischmann") and Lawrence E. Gelber ("Dr. Gelber") (collectively referred to as the "Plaintiffs") presented evidence in their case-in-chief (including their one medical expert) that their mother, Beverly E. Gelber ("Mrs. Gelber"), lacked capacity to transfer property to her other daughter, Meryl Glock ("Mrs. Glock"), the Plaintiffs' causes of action for undue influence and fraud became fatally flawed and unsalvageable.

At the conclusion of the Plaintiffs' case-in-chief, the trial court granted Mrs. Glock's motion to strike because the evidence presented by the Plaintiffs disproved their own case. Joint Appendix ("J.A.") 150-53. The

Plaintiffs' case was properly struck because their own evidence of lack of capacity extinguished the possibility of a finding of undue influence and fraud. Even assuming *arguendo* that the Plaintiffs were entitled to a presumption of undue influence, it was rebutted when they elicited uncontroverted testimony from Mrs. Glock, who was present at the *factum,* that Mrs. Gelber knew what she was signing and that it was her free and voluntary act to do so. Consequently, this Court should affirm the trial court's ruling on the motion to strike and remand this matter to the trial court for the determination and award of the additional fees and costs incurred by Mrs. Glock on appeal.

PLAINTIFFS' ALLEGATIONS AND PROCEDURAL HISTORY

In their Third Amended Complaint (the "Complaint"), the Plaintiffs, who are the co-executors of Mrs. Gelber's estate (the "Estate") and the co-trustees of the Beverly E. Gelber Trust (the "Trust"), alleged that Mrs. Glock improperly asserted ownership over a home located at 3409 Edwardsville Drive, Glen Allen, Virginia (the "Edwardsville Home") and the personal property contained therein (the "Personal Property"). J.A. 3. The Edwardsville Home and the Personal Property were the subject of a deed of gift (the "Deed of Gift") and bill of sale (the "Bill of Sale") executed by Mrs. Gelber on July 18, 2014. J.A. 3-4.

The Plaintiffs asserted nine counts: (1) Count I alleged that the transfers of the Edwardsville Home and the Personal Property were based on actual or constructive fraud; (2) Count II sought rescission of the Deed of Gift and Bill of Sale based on undue influence; (3) Count III sought recovery for duress; (4) Count IV sought recovery for grossly inadequate consideration; (5) Count V requested an equitable accounting; (6) Count VI requested the imposition of a constructive trust; (7) Count VII sought recovery of the Personal Property in detinue and/or conversion; (8) Count VIII alleged that Mrs. Gelber did not possess legal title to transfer the Personal Property to Mrs. Glock; and (9) Count IX sought recovery for statutory and common law conspiracy. J.A. 16-21. The Plaintiffs did <u>not</u> assert a cause of action to rescind the Bill of Sale and Deed of Gift on the basis that Mrs. Gelber lacked capacity to execute the documents. Mrs. Glock filed a counterclaim (the "Counterclaim") alleging breaches of the warranties contained in the Bill of Sale. J.A. 100-10.

Prior to the trial, Count III (duress) and Count VIII (ineffective transfer of the Personal Property) were dismissed after being voluntarily withdrawn by the Plaintiffs. J.A. 136-37.

After the trial court properly sustained the motion to strike, the Plaintiffs stipulated that: (1) Mrs. Glock was entitled to prevail on the

Counterclaim; (2) Mrs. Glock had incurred attorneys' fees and costs of $361,088.25 in the aggregate as of November 30, 2015; and (3) the fees and costs incurred by Mrs. Glock were reasonable and were necessary in the aggregate to defend the claims asserted in the Complaint and to prosecute the Counterclaim. J.A. 245-46. The trial court found that Mrs. Glock was the prevailing party on all claims asserted by the Plaintiffs, all of which sought recovery of and/or damages for the Personal Property conveyed by the Bill of Sale (which contained the warranty language). J.A. 348-51. As a result, the trial court awarded Mrs. Glock all of the fees and costs that she incurred and entered judgment in her favor in the amount of $370,850.75 with interest at 6% from the date of judgment (the "Fee and Cost Award"). J.A. 348-51.

STATEMENT OF FACTS

a. Amplified Statement of Facts

For as long as Mrs. Gelber lived in Virginia, Mrs. Glock, served as her primary caregiver, who transported her mother to various appointments and helped with her finances. J.A. 857-58, 1045-47. Mrs. Gelber's accountant, Frances Goldman (the "Accountant"), described Mrs. Gelber as "a resolute, strong, independent woman" who was "very private and very protective of her assets and her thoughts." J.A. 803. In regards to her mother's finances,

the Accountant described Mrs. Glock as meek, unassuming, “not meddlesome in the least” and very respectful of her mother’s privacy. J.A. 807-08. The Accountant also testified that behind closed doors, Mrs. Gelber was very complimentary and appreciative of Mrs. Glock. J.A. 809.

In the spring of 2013, the Accountant discussed with Mrs. Gelber whether she may want to favor one child over the other. J.A. 804-05. In response, Mrs. Gelber stated that she wanted to do something for Mrs. Glock because she “had been so kind to her and thoughtful and worked so hard to keep her mobile when she could no longer get around on her own.” J.A. 806. Mrs. Gelber also voiced her concerns to the Accountant that her “other children might take advantage” of Mrs. Glock “because she is so meek and reticent in her behavior and non-meddlesome and she doesn’t defend herself well.” J.A. 805.

Subsequently, Mrs. Gelber expressed her intent to gift the Edwardsville Home to Mrs. Glock on several occasions. J.A. 1056. During the first half of 2014, Mrs. Gelber repeatedly told Mrs. Glock that she wanted to gift her the Edwardsville Home and Mrs. Glock repeatedly refused Mrs. Gelber’s offer for fear that it would upset her other siblings (namely, the Plaintiffs). J.A. 1056-59. When Mrs. Glock finally accepted the

offer, her mother told her not to tell anyone of the transfers until after she passed away because she did not want the Plaintiffs to know. J.A. 1106-07. Mrs. Gelber also told her other daughter, Linda Landa ("Mrs. Landa") and her son-in-law, Philip Landa ("Mr. Landa") (collectively, the "Landas") of her intent to gift the Edwardsville Home and the Personal Property to Mrs. Glock and instructed the Landas to "get it done." J.A. 1105.

In 2014, Mrs. Gelber was battling terminal cancer. J.A. 832. When Mrs. Gelber's cancer prognosis took a turn for the worse, she told Mrs. Glock and Mr. Landa that the "vultures (referring to the Plaintiffs) were circling." JA. 1096-98.

On July 3, 2014, Mrs. Gelber was admitted to St. Mary's Hospital (the "Hospital") as the result of side effects from chemotherapy. J.A. 1633. Upon admission, Mrs. Gelber was noted to be alert and oriented to person, place and time. J.A. 750. Over the next few days, various medical personnel described Mrs. Gelber as calm, alert and oriented with appropriate decision making. J.A. 751-52. During her 18-day stay at the Hospital, Mrs. Gelber's medical records reflected that at times, she was clearly alert and oriented to person, place, time and situation.[1] J.A. 1641, 1648, 1665, 1675-76,

[1] More than a dozen different health care providers (doctors, nurses and a physical therapist) noted that Mrs. Gelber was alert and oriented to person,

1679, 1682-83, 1685. At other times, Mrs. Gelber was described as weak and forgetful, with decreased insight into her deficits. J.A. 1664, 1669, 1686.

In July 2014, Mr. Landa, on behalf of Mrs. Gelber, attempted to retain a Virginia attorney to draft the legal documents to effectuate the transfer of the Edwardsville Home and Personal Property in accordance with Mrs. Gelber's clearly expressed intentions. J.A. 878-80, 1525. Mr. Landa hired the law firm of Spinella, Owings and Shaia (the "Law Firm") to draft the necessary documents to effectuate the transfer. J.A. 886. The Law Firm considered Mrs. Gelber to be the client. J.A. 886, 889. Mrs. Glock did not assist with the hiring of the attorney and did not have any interaction with the attorneys at the Law Firm. J.A. 891. Mrs. Glock simply picked up the Deed of Gift and the Bill of Sale from the Law Firm. According to a lawyer from the Law Firm, Mrs. Glock did not participate in the transaction at all.[2] J.A. 889-91, 1104.

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place time and/or situation at various times throughout her hospitalization. J.A. 1633-89.

[2] The Plaintiffs repeatedly suggest that Mrs. Glock hired the attorney. Op. Br. at 6, 19, 38. There is no evidence in the record to support this factual allegation. Mr. Landa hired the attorney at the request of Mrs. Gelber. J.A. 886. In fact, the trial court repeatedly sustained objections to the Plaintiffs' questions that presumed Mrs. Glock's involvement with the hiring of a lawyer. J.A. 1102-04.

On July 18, 2014, Mrs. Gelber executed the Deed of Gift and Bill of Sale at the Hospital. J.A. 1316-20. During a physical therapy session that same day, a therapist noted at 12:58 p.m. EDT that Mrs. Gelber: (1) was alert and remained alert throughout her treatment session and she was excited about her potential discharge from the Hospital that day; (2) made no complaints of dizziness or pain during treatment; and (3) was alert and oriented to person, place, time and situation, and that her cognition was appropriate for age. J.A. 755-56, 1665-67.

Mrs. Glock testified that she did not "know exactly" when she arrived at the Hospital on July 18, 2014, but she thought it was "late afternoon." J.A. 1114. In fact, Mrs. Glock called a patient advocate/notary public (the "Patient Advocate") at 1:13 p.m. EDT upon her arrival at the Hospital. J.A. 1113-21, 1512 (see Item No. 672), 1775.[3] Mrs. Gelber's doctor noted at 1:18 p.m. EDT that she was to be discharged to a skilled nursing facility and that Mrs. Gelber was "stable for discharge."[4] J.A. 1457.

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[3] The telephone records (the "Phone Records") that were moved into evidence by the Plaintiffs were "stored and displayed" in Coordinated Universal Time ("UTC"). J.A. 1775. UTC requires a subtraction of four hours to determine local time. *See* Op. Br. at 18 n.87.

[4] Also that same day, Mrs. Gelber's nurse noted that she was alert and oriented times four (person, place, time and situation) and that Mrs. Gelber's cognition was appropriate for age, attention and concentration. J.A. 758.

Mrs. Glock engaged in two lengthy conversations with the Landas that same afternoon: (1) at 1:52 p.m. EDT, Mrs. Glock and the Landas engaged in a 12 minute 36 second conversation; and (2) at 3:47 p.m. EDT, Mrs. Glock and the Landas engaged in a 13 minute 10 second conversation. J.A. 1512 (Item 674), 1513 (Item 684).

Indeed, Mrs. Glock testified that she was on the phone with the Landas when the Patient Advocate finally arrived at the hospital room to witness the execution of the legal documents. J.A. 1121. Mrs. Glock proceeded to put the Landas on speaker phone and she placed the phone on Mrs. Gelber's bed. J.A. 1121-22. Mrs. Gelber then executed the Bill of Sale and Deed of Gift before Mrs. Glock and the Patient Advocate. J.A. 1115. At that time, Mrs. Glock described her mother as awake, alert and excited about her potential discharge from the Hospital. J.A. 1115-19.

The Patient Advocate spoke with Mrs. Gelber for approximately ten minutes. J.A. 1124-25. Prior to Mrs. Gelber's execution of the documents, Mrs. Glock stated **"Mom, you sure you still want to do this?"** J.A. 1126 (emphasis added). In response, Mrs. Gelber stated **"[j]ust give me the pen."** J.A. 1126 (emphasis added). The Patient Advocate also asked Mrs. Gelber if she knew what she was signing and Mrs. Gelber responded

"yes." J.A. 776 (emphasis added). At trial, the Plaintiffs elected not to call the Patient Advocate, an objective witness present at the *factum*.

At 4:28 p.m. EDT, Mrs. Gelber was advised by the medical staff at the Hospital that she would not be discharged to Beth Sholom (a nursing home in Richmond) because Beth Sholom was unable to accept a patient "over the weekend with IV fluids." J.A. 1457. The Plaintiffs have suggested that Mrs. Glock's testimony should not be believed because she indicated that her mother was still excited about her potential discharge when she executed the documents, which the Plaintiffs suggest happened after 5 p.m. EDT. Op. Br. at 5 n.27. Notably, Mrs. Gelber was advised at 4:30 p.m. EDT that she would not be discharged that afternoon (even though she was stable). This occurred approximately 30 minutes <u>after</u> Mrs. Glock concluded her second conversation with the Landas that afternoon and thus after her execution of the documents. J.A. 1457, 1513 (Item 684). This is entirely consistent with Mrs. Glock's testimony that at the time of executing the documents, which occurred earlier that day, Mrs. Gelber was "stable for discharge" and was excited about her potential discharge that afternoon. J.A. 1116, 1457.

Mrs. Fleischmann did not interact with her mother on the day she executed the Deed of Gift and Bill of Sale (i.e., July 18, 2014). J.A. 702.

However, this did not stop Mrs. Fleischmann from opining about her mother's capacity on the day in question. During cross examination, Mrs. Fleischmann testified as follows:

> Q: I am speaking directly of the Deed of Gift and the Bill of Sale signed by your mother at St. Mary's Hospital on July 18. I asked the question: Do you think she lacked capacity to understand what she was signing. And I'm asking you if you remember your response.
>
> A: I don't.
>
> Q: Answer: One hundred percent.
>
> A: That she lacked capacity?
>
> Q: Yes.
>
> A: Okay.
>
> Q: And that is consistent with your testimony today?
>
> A: **Absolutely.**

J.A. 704 (emphasis added). On multiple occasions, Mrs. Fleischmann testified that her mother referred to her time in the Hospital as being in a "coma" with no recollection of why she was there and/or who she saw. J.A. 647-48, 697.

Dr. Gelber suggested that he saw his mother on July 18, 2014, at 5:30 p.m. EDT, but she was sleeping when he came into her room. J.A.

1173-75. Dr. Gelber conceded that the only persons who knew what was said and what happened at the time Mrs. Gelber executed the Bill of Sale and Deed of Gift were those present in the hospital room on July 18, 2014. J.A. 1189. However, like Mrs. Fleischmann, Dr. Gelber's testimony negated the Plaintiffs' claims of fraud and undue influence. By testifying that Mrs. Gelber told him that she had no recollection of signing the documents, Dr. Gelber also suggested that Mrs. Gelber lacked capacity to execute the Deed of Gift and the Bill of Sale. J.A. 1190.

Similarly, Dr. Dennis O'Neill ("Dr. O'Neill"), who was the Plaintiffs' only expert, defeated the Plaintiffs' claims of fraud and undue influence. Despite the fact that the Plaintiffs were not asserting a claim for lack of capacity, Dr. O'Neill confirmed that he was retained to "testify concerning Beverly Gelber's physical and cognitive capacity on or about July 18th" and "her capacity to enter into written agreements concerning significant financial obligations in light of those impairments." J.A. 748-49. Dr. O'Neill opined that on July 18, 2014, Mrs. Gelber lacked capacity. J.A. 742, 777-78.

On July 21, 2014, Mrs. Gelber was discharged from the Hospital and was transferred to Beth Sholom (a nursing home in Richmond). J.A. 1652. On July 24, 2014, Mrs. Fleischmann and her daughters removed valuable

items of the Personal Property (e.g., a diamond ring, a tea set and ivory pieces) from the Edwardsville Home that were subject to the Bill of Sale executed six days prior. J.A. 899, 901. On July 28, 2014, when Mrs. Glock discovered that property had been removed from the Edwardsville Home, she confirmed with Mrs. Gelber that Mrs. Fleischmann did not have permission to take it. J.A. 1108-11. As a result of these items being removed by Mrs. Fleischmann and her daughters, Mrs. Glock arranged to change the locks to the Edwardsville Home. J.A. 1111.

On July 29, 2014, Mrs. Fleischmann's daughters attempted to enter the Edwardsville Home but they were advised that they were not permitted on the property and that Mrs. Glock now owned it. J.A. 904-07. Consequently, the transfer of the Edwardsville Home and the Personal Property was now public knowledge to the rest of the family. J.A. 907. In response, Mrs. Fleischmann's daughters went to Mrs. Gelber and fabricated a story that Mrs. Glock was taking things out of the Edwardsville Home.[5] J.A. 828-29. In reality, it was Mrs. Fleischmann and her daughters who were removing items from the Edwardsville Home without permission. J.A. 899, 901, 1108-11.

[5] The Plaintiffs presented no evidence identifying specific items of personal property that Mrs. Glock ever allegedly removed from the Edwardsville Home.

When Mrs. Fleischmann was notified about the transfer of the Edwardsville Home and the Personal Property, she and her daughters exchanged harsh and crude text messages, including, but certainly not limited to, "[g]ame on" and "[t]hose b--ches (referring to her sisters Mrs. Glock and Mrs. Landa) can bring it." J.A. 965-66, 1692-93.

Despite their mother's condition, the Plaintiffs procured various legal documents from their mother under very questionable circumstances over the last few weeks of her life, including a power of attorney naming the Plaintiffs as her attorneys-in-fact, a "declaration" and multiple amendments to her estate plan which disinherited Mrs. Glock and Mrs. Landa. J.A. 760-61, 1335-46. On July 30, 2014 (almost two weeks after the property transfer and nine days after her discharge from the Hospital), while still a resident at Beth Sholom, Mrs. Gelber refused medical care and her medications and it was noted that she had an extremely foul odor. J.A. 760. In fact, Mrs. Gelber had a large amount of fecal matter in her hair, on her face and lower body. J.A. 760-61. The odor was so strong that it could be smelled from the nurses' station. J.A. 760-61. The next day (i.e., July 31, 2014), the Plaintiffs exchanged text messages stating that they should only be telling Mrs. Gelber "need-to-know stuff at this point." J.A. 1695.

Mrs. Gelber frequently refused her medications following her discharge from the Hospital. J.A. 762.

Dr. Jennifer Ferguson (Mrs. Gelber's primary care physician) (the "Primary Care Physician") testified that in August and September of 2014 (after her discharge from the Hospital), Mrs. Gelber was on a downward trajectory. J.A. 865-66. Concerned that she would not have access to her mother's checking account to pay Mrs. Gelber's bills, Mrs. Glock withdrew $7,500. J.A. 1130. When a demand was made for a return of the $7,500, Mrs. Glock complied expeditiously (within days) and requested to see her mother.[6] J.A. 1745-46. She was never given the chance.

The Plaintiffs isolated Mrs. Gelber from Mrs. Glock and the Landas. In August 2014, Mrs. Gelber was moved to an assisted living facility in Baltimore, Maryland (where Mrs. Fleischmann resides and a place where Mrs. Gelber had never previously lived). J.A. 827-28. Dr. Gelber told the Primary Care Physician that Mrs. Gelber's whereabouts must remain unknown to Mrs. Glock. J.A. 864, 1181.

On August 8, 2014, Mrs. Gelber executed a declaration (the "Declaration") stating that she did not remember signing her possessions

[6] Mrs. Glock returned the funds in the same denominations and in the same envelope received at the bank. Mrs. Glock wrote "Mom" on the outside of the envelope designating these funds as belonging to her mother. J.A. 1745.

over to Mrs. Glock.[7] J.A. 1335. Just days later (i.e., August 11, 2014), Mrs. Fleischmann noted that Mrs. Gelber: (1) was "confused;" (2) had "no idea" where she was or anything; and (3) had "no recollection of getting up today." J.A. 698-99. That same day, it was determined that Mrs. Gelber was not mentally alert to take her own medications and was physically unable to sign her admission into hospice care. J.A. 767-68. In fact, Mrs. Gelber was unaware that she had been admitted to hospice care. J.A. 769.

On September 9, 2014, Mrs. Gelber executed the Second Amendment to the Trust which disinherited Mrs. Glock and Mrs. Landa as beneficiaries under the Estate. J.A. 1342-46. The next day, Mrs. Fleischmann noted that Mrs. Gelber "sleeps all day, every day" and "struggles to sit up" or get into a chair for a few minutes. J.A. 1706. On September 12, 2014, Mrs. Gelber told health care personnel that she was ready to die. J.A. 773-74. Mrs. Gelber also began to experience auditory and visual hallucinations during which she called out for Mrs. Glock. J.A. 774-75. Mrs. Gelber died on September 19, 2014. J.A. 1201.

[7] The Declaration, dated August 8, 2014, was notarized by counsel for the Plaintiffs. The Plaintiffs presented no evidence to corroborate the purported statements contained in the Declaration.

The Plaintiffs' ill-will towards Mrs. Glock was so venomous that they refused to even notify Mrs. Glock (or the Landas) of the fact of Mrs. Gelber's death and funeral arrangements. J.A. 692-93. It was not until September 24, 2014, that counsel for the Plaintiffs finally notified counsel for Mrs. Glock of Mrs. Gelber's death at which point burial had already taken place. J.A. 1749.

b. Correction of Factual Misstatements in the Brief of the Appellants.

At trial, the Plaintiffs read in portions of the deposition testimony of Mrs. Glock, which had devastating consequences to their case-in-chief. As discussed above, the Plaintiffs established Mrs. Gelber intended to gift her property to Mrs. Glock as her free and voluntary act. J.A. 1219. On appeal, the Plaintiffs' have attempted to impeach Mrs. Glock to evade the repercussions of this testimony. However, in doing so, the Plaintiffs have repeatedly misstated the timing of critical telephone conversations at or near the *factum*. Op. Br. at 3, 5, 15-17, 18, 39.

The Plaintiffs ignore that the Phone Records they moved into evidence were "stored and displayed" in UTC.[8] J.A. 1775. It is undisputed

[8] At trial, the Plaintiffs moved the Phone Records into evidence with no supporting testimony to explain their contents to the Court and/or jury. J.A. 984. The Plaintiffs' demonstrative exhibit (the "Plaintiffs' Demonstrative Exhibit") regarding the Phone Records converts the Phone Records from

that the actual phone log for July 18, 2014, states that the "records are stored and provided in UTC" and the column listing the connection time for each call states "Conn. Time (UTC)." J.A. 1512. In addition, the records key for the Phone Records (the "Records Key"), which was also moved into evidence by the Plaintiffs, further clarifies that the connection time on the Phone Records "is in UTC." J.A. 1775.

UTC requires a subtraction of four hours to determine local time.[9] *See* Op. Br. at 18 n.87. As a result, the Plaintiffs' repeated suggestions that Mrs. Glock called the Patient Advocate at "5:13 p.m." local time is factually incorrect.[10] J.A. 1512, 1519-1520. Instead, the Phone Records establish

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military time to standard time but fails to take the additional and *necessary* step of converting the Phone Records from UTC to Eastern Daylight Time ("EDT"). J.A. 1510.

[9] The U.S. Department of Commerce's National Oceanic & Atmospheric Administration's Conversion Table for UTC, can be found at www.noaanews.noaa.gov/hurricanes/zulu-utc.html. To convert UTC (or Zulu Time) to local time, four hours are subtracted to determine EDT. Since the execution of the documents occurred in July, the appropriate conversion is to EDT (not Eastern Standard Time).

[10] The Plaintiffs' suggestion that Mrs. Glock is approbating and reprobating is incorrect and their reliance on *Rowe v. Commonwealth*, 277 Va. 495 (2009) is misplaced. Op. Br. at 18 n.87. In *Rowe*, this Court held that a party cannot take advantage of a situation created by his own wrong. *Id.* at 502. It is the Plaintiffs who should not be permitted to take advantage of a situation created by their own wrong. The Plaintiffs' Demonstrative Exhibit, which was created by counsel for the Plaintiffs, does not accurately reflect the Phone Records on which it is based.

that on July 18, 2014, Mrs. Glock called the Patient Advocate at 1:13 p.m. EDT and the phone call lasted 43 seconds. J.A. 1512 (Item 672).[11] The Plaintiffs also misstate that Mrs. Glock did not engage in a telephone conversation with the Landas after her call to the Patient Advocate. Op. Br. at 18 n.87.[12] In actuality, the Phone Records establish that Mrs. Glock engaged in two lengthy conversations with the Landas that afternoon: (1) at 1:52 p.m. EDT, Mrs. Glock and the Landas engaged in a 12 minute 36 second conversation; and (2) at 3:47 p.m. EDT, Mrs. Glock and the Landas engaged in a 13 minute 10 second conversation. J.A. 1512 (Item 674) and J.A. 1513 (Item 684).[13] Mrs. Glock testified that the Patient Advocate arrived at hospital room during a phone call with the Landas. J.A. 1121-22. The Plaintiffs' suggestion that they are entitled to some sort of inference that these phone calls occurred much later in the evening (or not all) is meritless. The Phone Records speak for themselves.

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[11] See also J.A. 1519-20 for a list of the relevant phone numbers.

[12] See also J.A. 1519-20 for a list of the relevant phone numbers.

[13] The Plaintiffs appear to take the untenable position that they are entitled to an inference that these telephone calls did not occur simply because Mrs. Glock (and not the Landas) initiated the phone calls. Op. Br. 18 n.87. The Records Key actually explains that the Originating Number "does not necessarily mean the number originated the data transaction. The network constantly communicates with internet enabled devices and the data records do not indicate if a customer initiated a data transaction." J.A. 1775.

Inexplicably, the Plaintiffs continue to maintain the inaccurate position that Mrs. Glock's telephone conversations with the Patient Advocate and the Landas occurred after 5:00 p.m. EDT.[14] The Plaintiffs' attempt to impeach Mrs. Glock's recollection of the timing of these phone calls and the document signing is futile because their position is wholly unsupported by the Phone Records that they moved into evidence.

SUMMARY OF ARGUMENT

The trial court's ruling on the motion to strike should be affirmed. The Plaintiffs' own evidence of lack of capacity extinguished the possibility of a finding of undue influence and fraud. Assuming *arguendo* that the Plaintiffs were entitled to a presumption of undue influence, it was rebutted when they elicited uncontroverted testimony from Mrs. Glock, who was present at the *factum,* that Mrs. Gelber knew what she was signing and that it was her free and voluntary act to do so. Further, the trial court did not err when it followed controlling precedent of this Court in ruling that Mrs. Gelber's statements subsequent to the execution of the documents were not admissible to establish the substantive fact of undue influence.

[14] These factual misstatements were brought to the Plaintiffs' attention after they filed their Petition for Appeal to ensure that the parties were complying with their obligation to present this Court with an accurate summary of the facts.

The trial court also properly excluded a purported tax assessment record (the "Tax Record") because it contained inadmissible opinion and failed to comply with Va. Code § 8.01-390.

Lastly, the trial court did not err in properly awarding Mrs. Glock the Fee and Cost Award because Mrs. Glock was the prevailing party on all claims asserted by the Plaintiffs, all of which sought recovery of and/or damages for the Personal Property conveyed by the Bill of Sale, and the Plaintiffs stipulated as to liability and the reasonableness of the Fee and Cost Award in the aggregate.

ARGUMENT AND STANDARD OF REVIEW

a. Assignment of Error No. 1: The Trial Court Properly Struck the Undue Influence Claim.

The trial court did not err in striking the Plaintiffs' undue influence claim. The Plaintiffs' undue influence claim was fatally defective for two reasons: (1) the Plaintiffs and their expert all testified that Mrs. Gelber lacked capacity to execute the Bill of Sale and Deed of Gift, which testimony defeats their claims for undue influence and fraud; and (2) assuming *arguendo* that the Plaintiffs' were entitled to a presumption of undue influence, they rebutted their own presumption by presenting the deposition testimony of Mrs. Glock that Mrs. Gelber intended to gift her property to Mrs. Glock as her free and voluntary act.

1. Undue Influence (and Fraud) Presuppose Capacity.

On appeal, this Court must view the evidence and the inferences reasonably raised thereby in the light most favorable to the Plaintiffs, whose evidence was stricken. *Austin v. Shoney's Inc.*, 254 Va. 134, 135 (1997). Viewing the evidence in the light most favorable to the Plaintiffs, the Plaintiffs' claims of undue influence and fraud were properly struck because their evidence established that Mrs. Gelber lacked capacity. Incapacity negates the possibility of undue influence (and fraud). In *Chappell*, the Court held that adopting and acting upon the suggestions of a third person pre-supposes a testator possessed a sound and disposing mind and memory. *Chappell*, 90 Va. 934. Undue influence and fraud have no application to a case in which requisite testamentary capacity is not proved to exist. *Id; See also Lisk*, 156 Fla. at 127 ("The issue of undue influence, or the issue of fraud, presupposes the existence of testamentary capacity. If therefore, there was a want of sufficient mental capacity on the part of the testator at the time of the making of the will, it then becomes unnecessary to consider the separate issues of undue influence and of fraud."); *In re Dunn*, 171 N.Y.S. 1056, 1063 (1918) ("Fraud and duress presuppose the existence of a person mentally capable of making a will"); *Hamilton v. Morgan*, 93 Fla. 311, 318 (1927) ("An attack on a will on the ground of

undue influence concedes the existence of testamentary capacity"); *In re Estate of Riggs*, 120 Ore. 38, 48 (1926) ("When a person wholly lacks testamentary capacity there is no room for the operation of fraud or undue influence").

Undue influence is a species of fraud. *Parfitt v. Parfitt*, 277 Va. 333, 339 (2009). This Court has defined undue influence as any abuse of a close or professional relationship by any means that overcomes the free will of another person and induces him to do what he otherwise would not have done. *See Weedon v. Weedon*¸ 283 Va. 241, 256 (2012); *see Gill v. Gill*, 219 Va. 1101, 1105-06 (1979). Undue influence "cannot operate upon one who is not of sound and disposing mind." *Gwin v. Gwin*, 5 Idaho 271, 279 (1897). In a case of undue influence, the will of another is substituted for that of the testator. *Id.*; s*ee also Weedon,* 283 Va. at 256 (holding that "[t]o be classed as 'undue' influence must place the testator in the attitude of saying: 'It is not my will but I must do it.'")

The Plaintiffs introduced the following evidence at trial: (1) Mrs. Fleischmann testified that her mother suggested that she was comatose at the Hospital; (2) Mrs. Fleischmann was one-hundred percent sure that Mrs. Gelber lacked capacity on July 18, 2014; (3) Dr. Gelber testified that Mrs. Gelber stated that she had no recollection of signing the

documents; (4) Mrs. Gelber signed a declaration that she did not recall gifting her property to Mrs. Glock; and (5) the Plaintiffs' expert opined that Mrs. Gelber lacked capacity. Without capacity, Mrs. Gelber could not have been subjected to undue influence (the overcoming of her free will) or fraud (the comprehension and reliance of a misrepresentation of fact to her detriment). *See Chappell*, 90 Va. at 934. "Undue influence cannot affect one who has no capacity." *Gwin*, 5 Idaho at 279.

On appeal, the Plaintiffs have retreated from their own evidence by suggesting that they only put on evidence of "weakness of mind and vulnerability." Op. Br. at 15. However, the Plaintiffs cannot successfully ask a court or jury to believe that they have not told the truth. *Massie v. Firmstone*, 134 Va. 450, 462 (1922). Their statements of fact and the necessary inferences therefrom are binding upon them. *Id.*

Through their own evidence and expert's opinion, the Plaintiffs negated their claims of undue influence and fraud.

2. Assuming *Arguendo* that the Plaintiffs were Entitled to a Rebuttable Presumption of Undue Influence, They Rebutted Their Own Presumption.

To prove undue influence the Plaintiffs were required to present clear and convincing evidence to establish that Mrs. Glock controlled the mind and directed the action of Mrs. Gelber. *See Weedon v. Weedon*, 283 Va. at

254-56. Undue influence may not be based upon bare suggestion, innuendo or suspicion and may not be inferred from circumstances which are capable of innocent construction. *Id.* at 256. The Plaintiffs' case was built on suggestion, innuendo and suspicion and utterly lacked any evidence that Mrs. Glock controlled the mind or directed the action of Mrs. Gelber. As a result, the Plaintiffs' only hope to survive the motion to strike their undue influence claim was to argue that they were entitled to a rebuttable presumption.

A presumption of undue influence arises and the burden of going forward with the evidence shifts to the defendant when weakness of mind (not incapacity) and grossly inadequate consideration or suspicious circumstances are shown or when a confidential or fiduciary relationship is established. *Friendly Ice Cream Corp. v. Beckner,* 268 Va. 23, 34 (2004).

However, even if the Plaintiffs were entitled to a rebuttable presumption, this "does not end the inquiry." *Weedon*, 283 Va. at 255. The Plaintiffs must also show that Mrs. Glock controlled and directed the action of Mrs. Gelber. *Id.* A rebuttable presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof,

which remains throughout the trial upon the party on whom it originally rested. Va. R. Evid. 2:301.

Near the end of their case-in-chief, the Plaintiffs inexplicably elected to present evidence about what actually happened at the *factum* through the deposition testimony of Mrs. Glock. Mrs. Glock testified that at the time of executing the documents: (1) her mother was awake, alert and excited about her potential discharge from the Hospital; (2) her mother interacted with the Patient Advocate for approximately ten minutes; and (3) Mrs. Glock stated "Mom, you sure you still want to do this?" and in response, Mrs. Gelber stated "[j]ust give me the pen." The Patient Advocate also asked Mrs. Gelber if she knew what she was signing and Mrs. Gelber responded "yes." The Plaintiffs voluntarily read in large portions of Mrs. Glock's deposition which resulted in the rebuttal of any presumption they may have arguably been entitled to.

The Plaintiffs presented no other evidence about what transpired at the *factum.* The Plaintiffs did not call the Landas, who were present by phone, or the Patient Advocate, who was physically present in the hospital room, when the documents were executed. The Plaintiffs also failed to call any of Mrs. Gelber's doctors, nurses or physical therapists who interacted with Mrs. Gelber on the day she executed the documents. Since the

Plaintiffs presented no other evidence of what transpired at the *factum*, they disproved their own case.

The Plaintiffs are not permitted to rise above the uncontroverted evidence from Mrs. Glock. *Owens v. DRS Auto. Fantomworks, Inc.*, 288 Va. 489, 495-96 (2014) (quoting *Weddle v. Draper*, 204 Va. 319, 322 (1963) ("When a defendant is called as an adverse witness the plaintiff is not bound by such of his testimony as in conflict with evidence introduced by the plaintiff, but the plaintiff is bound by so much of the testimony of the defendant as is clear, reasonable and uncontradicted")); s*ee also Brown v. Metz*, 240 Va. 127, 128-32 (1990) (plaintiff was bound by the testimony of the adverse party, whom plaintiff had called as a witness, because it was uncontradicted and not inherently improbable); *Balderson v. Robertson*, 203 Va. 484 (1962) (plaintiff was bound by the testimony of the defendant insofar as it was uncontradicted and not inherently improbable).

The Plaintiffs cite to *Braden v. Isabell K. Horsely Real Estate Ltd.*, 245 Va. 11 (1993) for the proposition that "only a party's unimpeached testimony may be relied upon to grant a motion to strike." Op. Br. at 13. As previously discussed, the Plaintiffs' attempt to impeach Mrs. Glock is faulty because it is based upon an inaccurate interpretation of the Phone Records. Regardless, this Court's more recent opinion in *Thornton v.*

Glazer, 271 Va. 566, 572 (2006) is more instructive. The issue in *Thornton* was whether a trial court properly refused an adverse witness jury instruction. The instruction read:

> The plaintiff called the defendant as an adverse witness. The plaintiff is bound by as much of the defendant's testimony given as an adverse witness as is clear, logical, reasonable and uncontradicted. The plaintiff is not bound by any of the defendant's testimony given as an adverse witness that conflicts with any of the other evidence in the case.

Id. at 571. The plaintiff "sought this instruction to provide guidance to the jury in its consideration of the defendant's deposition testimony that was introduced during Thornton's (i.e., the plaintiff's) case in chief." *Id*. This Court held that "[d]eposition testimony that is admitted into evidence should be treated in the same manner as live testimony. For the purpose of an instruction regarding the jury's consideration of testimony of an adverse witness, there is no distinction to be made between ore tenus testimony and deposition testimony pursuant to Rule 4:7." *Id.* at 572. In *Thornton*, this Court concluded that the trial court erred in its refusal of the instruction. *Id.* at 573.

The Plaintiffs failed to present any evidence of undue influence. Instead, they presented evidence from Mrs. Glock that Mrs. Gelber executed the Deed of Gift and Bill of Sale as her free and voluntary act. In

Weedon, this Court found that a trial court erred when it placed more weight on the testimony of the plaintiffs' expert and the decedent's other children who were not present when she executed the will than it did on the testimony of the witnesses, the notary, and daughter who were present when the will was executed. *Weedon*, 283 Va. at 254. "The testimony of those present at the *factum*—when the will is executed—is entitled to the greatest consideration." *Id.* (quoting *Parish v. Parish*, 281 Va. 191, 200 (2011)). This Court concluded its analysis in *Weedon* by holding that the trial court improperly focused on the circumstantial evidence that raised the presumption of undue influence while overlooking the ultimate inquiry: whether the decedent's will was overridden. *Id.* at 257.

The trial court did not weigh the testimony of Mrs. Glock against the testimony of the Plaintiffs because the Plaintiffs presented no evidence that Mrs. Gelber's free will was overridden or that Mrs. Glock brought any influence to bear at the *factum* (or elsewhere for that matter). The fact that Mrs. Gelber may have been very ill, in a great deal of pain or was dying when she executed the Deed of Gift and Bill of Sale does not prove undue influence by clear and convincing evidence. *See Weedon*, 283 Va. at 258.

b. <u>Assignment of Error No. 2</u>: Mrs. Gelber's Statements Not Contemporaneous with the Execution of the Documents Cannot be Relied Upon to Establish Undue Influence.

This Court reviews a trial court's decision to admit or exclude evidence using an abuse of discretion standard and, on appeal, will not disturb the trial court's decision to exclude evidence absent a finding of abuse of that discretion. *Harman v. Honeywell Int'l Inc.*, 288 Va. 84, 92 (2014). The trial court admitted the Declaration and many other statements of Mrs. Gelber into evidence at trial. Despite this, the trial court properly ruled that the Plaintiffs could not rely on statements made by Mrs. Gelber that were not contemporaneous with the execution of the Deed of Gift and Bill of Sale to establish undue influence. *See Wallen v. Wallen*, 107 Va. 131, 157 (1907); *Core v. Core*, 139 Va. 1, 11 (1924); *Savage v. Nute*, 180 Va. 394, 402 (1942).

The declarations of a party to a deed made either before or after the execution of the deed are not admissible to establish the substantive fact of undue influence. *Savage,* 180 Va. at 402 (citing *Wallen,* 107 Va. at 152-53). A testator's "assertion that a person named, or unnamed, has procured him by fraud or by pressure to execute a will, or to insert a provision, is plainly obnoxious to the hearsay rule, if offered as evidence that the fact asserted did occur." *Core,* 139 Va. at 7 (quoting 3 Wigmore on Evidence

(2d ed.)). The holdings of *Wallen*, *Core* and *Savage*, are entirely consistent with more recent precedent of this Court addressing undue influence. *See Weedon v. Weedon*, 283 Va. at 254.[15]

The Plaintiffs' suggestion that *Wallen*, *Core* and *Savage* ignore and/or are inconsistent with Va. Code Ann. § 8.01-397 (the "Dead Man's Statute") is unavailing. This Court's rulings in *Savage* and *Core*: (1) post-date the present version of the Dead Man's Statute, which took effect in 1919; and (2) specifically address undue influence claims only. To accept the Plaintiffs' argument, this Court would have to conclude that it simply forgot about or ignored the Dead Man's Statute (which had been in effect for 23 years) in deciding *Savage*.

The rule of law established in *Wallen* is firmly established in Virginia. The Plaintiffs' suggestion that *Wallen* was distinguished by *Jackson v. Hewlett*, 114 Va. 573 (1913) is incorrect. Op. Br. at 31. *Jackson* did not overrule or even modify *Wallen*. *Wallen* dealt with a claim of undue influence and *Jackson* did not. Consequently, this Court in *Jackson* stated that *Wallen* "does not deal with the question presented in the case at bar, and is not helpful in its consideration." *Jackson*, 114 Va. at 579.

[15] In *Weedon*, this Court cited to and quoted *Wallen*. *Id.* at 257.

Not surprisingly, the Plaintiffs fail to cite to a single case in which the Dead Man's Statute was utilized to introduce the declarations of a party to a deed made either before or after the execution of the deed to establish the substantive fact of undue influence. Under *Wallen*, *Core* and *Savage*, the Plaintiffs are not allowed to bolster their undue influence claim with Mrs. Gelber's after-the-fact declarations which cannot be cross-examined or contradicted. As this Court has emphasized, "nothing could be more dangerous than the admission of" these types of declarations "to control the construction of an instrument, or to support or destroy its validity." *Wallen,* 107 Va. at 153-54.

While the trial court admitted the Declaration into evidence, it properly refused to consider Mrs. Gelber's declarations not contemporaneous with the execution of the Bill of Sale and Deed of Gift in ruling upon the undue influence claim.

c. <u>Assignment of Error No. 3</u>: The Trial Court Properly Struck the Fraud Claim.

The trial court did not err in striking the Plaintiffs' fraud claim. On appeal, this Court must view the evidence and the inferences reasonably raised thereby in the light most favorable to the Plaintiffs, whose evidence was stricken. *Austin*, 254 Va. at 135. In proving a claim of fraud, the Plaintiffs were required to establish the following elements: (1) a false

representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) resulting damage to the party misled. *See State Farm Mut. Auto Ins. Co. v. Remley*, 270 Va. 209, 218-19 (2005).

An essential element of a fraud claim is "reliance by the party misled." *Remley*, 270 Va. at 218 (actual fraud); *see Mortarino v. Consultant Eng'g Servs.*, 251 Va. 289, 295 (1996) (constructive fraud requires "reliance upon the misrepresentation."). For the reasons discussed in response to the first assignment of error, the Plaintiffs' fraud claim was fatally defective because the Plaintiffs' presented evidence of Mrs. Gelber's lack of capacity. Without capacity, Mrs. Gelber could not have been subjected to fraud (i.e., she could not have comprehended the alleged factual misrepresentation and/or relied on it to her detriment). *See Chappell*, 90 Va. at 934 (holding that adopting and acting upon the suggestions of a third person pre-supposes a testator possessed a sound and disposing mind and memory, and has no application when the requisite testamentary capacity is not proved to exist.); *See also Lisk*, 156 Fla. at 127 ("The issue of undue influence, or the issue of fraud, presupposes the existence of testamentary capacity.") *See also In re Estate of Riggs*, 120 Ore. at 48 ("[w]hen a person wholly lacks

testamentary capacity there is no room for the operation of fraud or undue influence").

The Plaintiffs' fraud claim is defective for additional reasons. The allegation that was supposedly the basis for the Plaintiffs' fraud claim can be summarized as follows: at some point—not specified temporally—Mrs. Glock led Mrs. Gelber to believe that Mrs. Glock would sell the Edwardsville Home and use the proceeds to construct an addition on her own residence, where Mrs. Gelber could then come and live. J.A. 16-17. Mrs. Glock denied having these discussions with her mother. J.A. 1050. Whether the cause of action was for actual fraud or constructive fraud, the Plaintiffs failed to present evidence of a misrepresentation of a material fact which was relied upon to Mrs. Gelber's detriment. *See SuperValu v. Johnson*, 276 Va. 356, 367-369 (2008) (holding that the plaintiff's evidence was insufficient as a matter of law to support a verdict on the constructive fraud claim because the plaintiff only showed that defendant made promises to the plaintiff to provide future financial support and assistance to plaintiff's companies).

In addition, a misrepresentation must relate to an actually existing or past fact. A promise, an expression of interest, or an expectation or opinion concerning the future is not a misrepresentation. *See Prospect Dev. Co. v.*

Bershader, 258 Va. 75, 86 (1999). A discussion about selling a home in the future and using proceeds for an addition is not an existing fact. The Plaintiffs argue that a promise made with no intention of performing may form the basis for a claim of actual fraud. Op. Br. at 34. However, under no circumstances, can a promise of a future action support a claim of constructive fraud. *Richmond Metro. Auth. v. McDevitt Street Bovis, Inc.* 256 Va. 553, 560 (1998).

In any event, the Plaintiffs failed to introduce any evidence that Mrs. Glock made a factual misrepresentation to Mrs. Gelber at the Hospital to induce her to sign the Deed of Gift or Bill of Sale. Mrs. Fleischmann was not present at the time of execution of the documents, and Dr. Gelber readily admitted that he does not know what Mrs. Glock may have said or done to persuade Mrs. Gelber to sign the Deed of Gift or Bill of Sale. J.A. 702, 1188-89. Further, the Plaintiffs repeatedly testified that Mrs. Gelber had no recollection of executing the Deed of Gift or Bill of Sale. J.A. 647-48, 697, 1190. Pointing to vague testimony that at some point, not specified temporally, Mrs. Gelber considered building an addition on Mrs. Glock's home is insufficient. J.A. 814-15, 820-21. *See Prospect Dev. Co.*, 258 Va. at 86.

d. <u>Assignment of Error No. 4</u>: The Trial Court Properly Struck the Conspiracy Claims.

The trial court did not err in striking the Plaintiffs' conspiracy claim. On appeal, this Court must view the evidence and the inferences reasonably raised thereby in the light most favorable to the Plaintiffs, whose evidence was stricken. *Austin*, 254 Va. at 135.

To recover in an action for conspiracy, the Plaintiffs were required to establish, by clear and convincing evidence, that Mrs. Glock and the Landas combined to accomplish some concerted action—a criminal or unlawful purpose by criminal or unlawful means, or some lawful purpose by criminal or unlawful means—that defrauded Mrs. Gelber out of the Edwardsville Home and the Personal Property. *Commercial Bus. Sys., Inc. v. Bellsouth Servs., Inc.*, 249 Va. 39, 48 (1995).

To prevail on statutory conspiracy, the Plaintiffs were required to prove by clear and convincing evidence, that Mrs. Glock and the Landas acted in concert to injure the Plaintiffs in their business. *Dunlap v. Cottman Transmission Sys., LLC*, 287 Va. 207, 214-15 (2014) (citing *Allen Realty Corp. v. Holbert*, 227 Va. 441, 449 (1984)); *Andrews v. Ring*, 266 Va. 311, 319 (2003) (holding that Virginia Code §§ 18.2-499 and 18.2-500 apply to business interests, and not to personal or employment interests).

The essence of conspiracy is damages. *Almy v. Grisham*, 273 Va. 68, 81 (2007) (finding that "[t]he gist of the civil action of conspiracy is the damage caused by the acts committed in pursuance of the formed conspiracy and not the mere combination of two or more persons to accomplish an unlawful purpose or use an unlawful means."); *Commercial Bus. Sys.,* 249 Va. at 48 (stating that "[t]he foundation of a civil action of conspiracy is the damage caused by the acts in furtherance of the conspiracy"). Actions for common law civil conspiracy and statutory business conspiracy lie only if the Plaintiffs sustained damages as a result of an act that is itself wrongful or tortious. *Beck v. Prupis*, 529 U.S. 494, 501 (2000); *Almy v. Grisham*, 273 Va. at 80.

Where statutory conspiracy is pled, however, the Plaintiffs were required to prove business damages, which of course is untenable in these circumstances. *Ward v. Connor*, 495 F. Supp. 434, 439 (E.D. Va. 1980), rev'd on other grounds, 657 F.2d 45 (4th Cir. 1981) (establishing "the focus of Virginia Code §§ 18.2-499 and 18.2-500 is upon conspiracies resulting in business-related damages."). The Plaintiffs have not been injured in their business. Therefore, it is respectfully submitted that any reliance on statutory conspiracy claim, therefore, is fatally defective.

The Plaintiffs attempted to introduce evidence of damages through a lay witness (Dr. Gelber) but were unable to do so because they could not establish a proper foundation. J.A. 1151-54. The Plaintiffs failed to retain and/or call an expert witness to testify about the fair market value of the Edwardsville Home and/or the Personal Property. The Plaintiffs have not assigned error to any ruling of the trial court regarding the preclusion of evidence of damages as it relates to the Personal Property. The trial court properly excluded the Tax Record because it contained inadmissible opinion and failed to meet the double authentication requirements of Va. Code § 8.01-390 (see Mrs. Glock's argument in response to Assignment of Error No. 6, *infra*).

Finally, even were the Plaintiffs capable of proving damages, the Plaintiffs presented no evidence of the predicate combination or concerted action. Mrs. Glock's sole role was in contacting an attorney (who declined the engagement) and then ferrying documents prepared by the Law Firm to and from the Hospital. According to a lawyer from the Law Firm, Mrs. Glock did not participate in the transaction at all. J.A. 889-91, 1104.

e. <u>Assignment of Error No. 5</u>: The Plaintiffs Failed to Preserve Error on this Issue by Voluntarily Dismissing Count VIII.

In an appeal from a trial court's decision to deny summary judgment, this Court reviews the application of law to undisputed facts de novo. *St.*

Joe Co. v. Norfolk Redevelopment & House Auth., 283 Va. 403, 407 (2012). The Plaintiffs moved for partial summary judgment on Count VIII by suggesting that the transfer effectuated by the Bill of Sale was a "nullity" because the Personal Property was owned by the Trust (and not Mrs. Gelber). J.A. 118-20. The trial court denied the Plaintiffs' motion for partial summary judgment. J.A. 131, 133-35.

However, prior to the start of trial, the Plaintiffs voluntarily withdrew Count VIII and it was dismissed by the trial court. J.A. 136-37. Counsel for the Plaintiffs endorsed the order dismissing Count VIII as "seen and agreed." J.A. 136-37. As a result, the Plaintiffs have failed to preserve error of this issue by expressly waiving and/or withdrawing Count VIII and agreeing to its dismissal prior to the start of the trial.

> Arguments made at trial via written pleading, memorandum, recital of objections in a final order, oral argument reduced to transcript, or agreed written statements of facts shall, **unless expressly withdrawn or waived,** be deemed preserved therein for assertion on appeal.

Va. Code Ann. § 8.01-384(A) (emphasis added). Once a litigant informs the trial court of his legal argument, "in order for a waiver to occur within the meaning of Code § 8.01-384(A), the record must affirmatively show that the party who has asserted an objection has abandoned the objection or has demonstrated by his conduct the intent to abandon that objection." *Helms*

v. Manspile, 277 Va. 1, 6 (2009). By voluntarily agreeing to dismiss Count VIII prior to the start of the trial, the Plaintiffs did just that.

In addition, the doctrine of judicial estoppel prevents the Plaintiffs from taking the position that the Trust owned the Personal Property. "Judicial estoppel forbids parties from assuming successive positions in the course of a suit, or series of suits, in reference to the same fact or state of facts, which are inconsistent with each other, or mutually contradictory." *Lofton Ridge, LLC v. Norfolk S. Ry. Co.*, 268 Va. 377, 380-81 (2004) (citations and internal quotation marks omitted). The application of judicial estoppel also requires the trial court to accept the party's earlier position. *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001).

At the outset of this litigation, counsel for the Plaintiffs represented to the trial court that Mrs. Gelber, not the Trust, owned the Personal Property. In fact, Mrs. Gelber, in her individual capacity, sought a pre-trial attachment of the Personal Property. Op. Br. at 1; J.A. 1-2. The Plaintiffs' counsel also represented to the trial court that: (1) Mrs. Gelber was a creditor because "she's a party from whom the property has been taken"; (2) there is "no dispute that this is her (i.e., Mrs. Gelber's) property"; and (3) "the nature of Mrs. Gelber's personal property, like most peoples', is that some of it is large and readily identifiable, and much of it is small and less susceptible to

recall or identification."[16] Tr., Aug. 28, 2014, 4:4-7, 20:2-5; Pet. for Pretrial Seizure and Attachment, at 3. The trial court relied on these factual representations regarding Mrs. Gelber's claims of ownership of the Personal Property when it enjoined Mrs. Glock from disposing, transferring and/or selling the Personal Property during the pendency of the litigation. J.A. 1.

The factual position that Mrs. Gelber owned the Personal Property when the Plaintiffs' counsel sought and were awarded an injunction (see J.A. 1-2) is wholly inconsistent and contradictory with the Plaintiff's "current" position that the Personal Property is owned by the Trust. Op. Br. at 40-44. The purpose of the judicial estoppel doctrine is to "protect the integrity of the judicial process" by "prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire*, 532 U.S. at 749-750. As a result, the Plaintiffs should not be permitted to now assert that the Trust owns the Personal Property because it is a more convenient factual position.

Lastly, the Plaintiffs' argument elevates form over substance. When Mrs. Gelber signed the Bill of Sale, she was the settlor, the sole trustee and

[16] These factual positions are consistent with the allegations in the Complaint wherein the Plaintiffs stated that this action "arises out of the improper and unlawful conveyance of Mrs. Gelber's personal property and possessions." J.A. 4.

the sole lifetime beneficiary of the Trust. The Plaintiffs argue that Mrs. Gelber did not own the Personal Property and could not convey them because she did not add the word "trustee" after her signature. The Trust was Mrs. Gelber's and she was free to tell the Trustee [herself] what she [herself, as beneficiary] had decided to do with the principal of the Trust.

Contrary to the Plaintiffs' argument, *Austin v. City of Alexandria*, 265 Va. 89 (2003) is not controlling. Op. Br. at 42-43. *Austin* dealt with real property which had been deeded into trust, with explicit direction as to how the real estate could be removed from trust. *Id.* at 95-96. In *Austin*, the settlor could not pull the real estate from the trust into which it was conveyed without the formality of a deed. *Id.* There are no such restrictions in Mrs. Gelber's Trust.

f. <u>Assignment of Error No. 6</u>: The Tax Record for the Edwardsville Home was Properly Excluded.

This Court reviews a trial court's decision to admit or exclude evidence using an abuse of discretion standard and, on appeal, will not disturb the trial court's decision to exclude evidence absent a finding of abuse of that discretion. *Harman*, 288 Va. at 92. The trial court did not err when it excluded the Tax Record.

"Copies of records of this Commonwealth . . . or of any political subdivision or agency of the same . . . shall be received as prima facie

evidence provided that such copies are authenticated to be true copies either by the custodian thereof or by the person to whom the custodian reports, if they are different." Va. Code § 8.01-390. To comply with this section, "double authentication is necessary to prove genuineness as a prerequisite to admission of a copy." *Ingram v. Commonwealth*, 1 Va. App. 335, 340 (1986). To properly authenticate such a record, a party must not only certify the copy as a true copy by the custodian of the record and the person to whom he reports (i.e., double authentication), but also . . . show "that the persons certifying are indeed the custodian and the person to whom he reports." *Id.* "Va. Code § 8.01-390 fixes a simple, easy way to authenticate an official document, and no reason suggests itself for excusing a failure to follow the prescribed course." *Taylor v. Maritime Overseas Corp.*, 224 Va. 562 n.2 (1983).

The Tax Record contained only one signature and a stamp that stated "I certify this printout to be the property information on file." J.A. 1612-14. As a result, the Tax Record was properly excluded because it did not meet the authentication requirements of Va. Code § 8.01-390.

In addition, the Tax Record was properly excluded because it contained inadmissible opinion evidence. *See Smith v. Woodlawn Const. Co.*, 235 Va. 424, 431-32 (1988) (trial court properly excluded evidence

from the tax assessor's strip file showing the value of the property because it contained opinion evidence); *see also Ward v. Commonwealth*, 216 Va. 177, 178 (1975) (medical examiner's opinion of cause of death of victim of homicide recorded in death certificate held inadmissible). The official documents exception to the hearsay rule does not permit the introduction of opinion evidence contained in any such records. *Woodlawn Const. Co.*, 235 Va. at 431-32.

g. <u>Assignment of Error No. 7</u>: The Fee and Cost Award is Appropriate.

The amount of a fee award rests within the sound discretion of the trial court, and this Court gives deference to the judgment of the trial court upon appellate review. *Coady v. Strategic Resources, Inc.*, 258 Va. 12, 18 (1999).

All counts of the Complaint asserted claims to the Personal Property.[17] J.A. 16-21. Mrs. Glock prevailed on all claims, and as a result, was entitled to recover all of her fees and costs. *Sheets v. Castle*, 263 Va. 407, 413 (2002). The Plaintiffs suggest that the Fee and Cost Award should be apportioned based on the value of the Personal Property. Op. Br. at 48. Curiously, the Plaintiffs, who were seeking recovery of the Personal

[17] The same cannot be said of the Edwardsville Home. Counts VII and VIII applied only to the Personal Property and not the Edwardsville Home. J.A. 20-21.

Property, failed to: (1) get the Personal Property appraised themselves; and/or (2) call an expert at trial to testify about its value. Instead, to contest the Fee and Cost Award, the Plaintiffs rely upon a valuation of the Personal Property done at the request of Mrs. Glock. Regardless, this Court has made clear that a "prevailing party" is the "party in whose favor a judgment is rendered, regardless of the amount of damages." *Id*. at 413.

The Plaintiffs contest the reasonableness of Mrs. Glock's fees but this argument is unavailing for two reasons: (1) the Plaintiffs stipulated that the total fees and costs incurred by Mrs. Glock were reasonable and were necessary in the aggregate to defend the claims asserted in the Complaint and to prosecute the Counterclaim; and (2) the Plaintiffs' own fees and costs were almost forty percent (40%) higher than Mrs. Glock's fees. J.A. 164, 245-246. In fact, counsel for the Plaintiffs spent 2,656.7 hours on this matter while counsel for Mrs. Glock spent substantially less time (1,137.7 hours). J.A. 164. Mrs. Glock did not elect to litigate with the Plaintiffs. Instead, she was forced to defend herself from the Plaintiffs' aggressive litigation and unfounded allegations of fraud, dishonesty and deceit.

The Plaintiffs' reliance on *Ulloa v. QSP, Inc.,* 271 Va. 72 (2006) is misplaced. Op. Br. at 47-50. In that matter the prevailing party sought an award of its fees and costs for a successful breach of contract matter, even

though it was unsuccessful with its trade secrets and business conspiracy claims. *Id.* at 78-79. It is important to note that the Court found that: (1) QSP was the prevailing party even though it was awarded no monetary damages under its breach of contract claim; (2) the results obtained by QSP in its litigation against Ulloa would be "characterized, at best, as marginally successful"; and (3) the misappropriation of trade secrets claim did not qualify as "any action relating" to the parties' contract as contemplated by the contract's fee-shifting provision. *Id.* at 81-83.

In the present matter, Mrs. Glock was successful in defeating all of the claims asserted by the Plaintiffs, all of which sought recovery of and/or damages for the Personal Property. The results obtained for Mrs. Glock were not "marginal." Instead, the trial court granted Mrs. Glock's motion to strike all claims at the close of the Plaintiffs' evidence, prompting the Plaintiffs to admit liability under the Counterclaim. J.A. 1252.

The Plaintiffs are the parties who aggressively pursued this litigation and they elected an expensive and confrontational litigation strategy. *See* J.A. 164, 245-46. The Fee and Cost Award should not be disturbed on appeal.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, Mrs. Glock respectfully requests that this Honorable Court affirm the trial court's rulings on the motion to strike and award of costs and attorneys' fees to Mrs. Glock. Mrs. Glock further requests this Court remand this matter to the trial court for a determination and award of additional attorneys' fees and costs incurred by Mrs. Glock on this appeal.

MERYL ANN GLOCK

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CERTIFICATE OF COMPLIANCE

The undersigned certifies as follows:

1. The names of the Appellants are Lawrence E. Gelber and Darlene A. Fleischmann, Co-Executors of the Estate of Beverly E. Gelber, Deceased and Co-Trustees of the Beverly E. Gelber Trust u/a dated 12/1/2010.

2. The names, Virginia State Bar numbers, address, telephone number, facsimile number and email addresses of counsel for the Appellants is:

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3. The name of the Appellee is Meryl Ann Glock.

4. There are no parties to this action not represented by counsel.

5. Undersigned counsel hereby certifies that on this 17th day of November, 2016, sufficient copies of the foregoing were hand-delivered to the Clerk of the Supreme Court of Virginia and mailed by U.S. mail, first class, to counsel for the Petitioners as listed above.

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